

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Petition of Bell Atlantic)
for Forbearance from)
Section 272 Requirements in Connection with)
National Directory Assistance Services)
_____)

CC Docket No. 97-172

To: The Commission

APPLICATION FOR REVIEW

I. INTRODUCTION AND SUMMARY

Pursuant to Part 1.115 of the Commission's Rules, Excell Agent Services, L.L.C. ("Excell Agent Services" or "Excell"), by its attorneys, hereby submits its Application for Review of the Common Carrier Bureau's Memorandum Opinion and Order in CC Docket No. 97-172 released in this matter on December 22, 1999.¹ According to the Communications Act, the FCC must forbear from applying the separate affiliate requirements in section 272 of the Communications Act to Bell Atlantic in its provision of national directory assistance ("DA") only if the FCC determines that all three of the statutory forbearance criteria are met. If any one

¹ *In re* Petition of Bell Atlantic for Forbearance From Section 272 Requirements in Connection With National Directory Assistance Services, Memorandum Opinion and Order, CC Dkt. No. 97-172 (Dec. 22, 1999)("Order").

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of the statutory criteria is not met, then the FCC cannot grant forbearance. Excell petitions the FCC to review the Bureau's decision that the statutory criteria for forbearance have been met.

The statutory criteria for forbearance require that the Commission to determine that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.²

By allowing Bell Atlantic to charge third parties seeking access to its DA data the same amounts that it "imputes" to itself, the Bureau is allowing Bell Atlantic to impose charges that are not just and reasonable, but rather are unjustly and unreasonably discriminatory. Moreover, allowing BA to charge unregulated "imputed" rates for DA data stifles competition, harms consumers, and is contrary to the public interest. Thus, the Bureau's decision to grant forbearance must be reversed by the Commission.

² 47 U.S.C. § 160(a).

II. ARGUMENT

A. THE FIRST STATUTORY CRITERION FOR FORBEARANCE IS NOT SATISFIED BY THE APPLICATION OF AND COMPLIANCE WITH THE NONDISCRIMINATION REQUIREMENTS ESTABLISHED BY THE FCC IN THE US WEST NATIONAL DIRECTORY ASSISTANCE ORDER

In its comments to Bell Atlantic's petition for forbearance, Excell stated that the should the FCC grant forbearance, it should also find that any pro-competitive safeguards established in CC Docket No. 99-273 must be applied to Bell Atlantic.³ Excell's comments demonstrated that the nondiscrimination requirements do not protect unaffiliated entities from the discriminatory practices of Bell Atlantic in its provision of DA listings. In order for forbearance to be appropriate, the FCC must ensure that the charges and practices related to the provision of DA are just and reasonable and not unjustly and unreasonably discriminatory.

The Bureau wisely recognized that in order for forbearance to be appropriate, it must require some conduct on behalf of Bell Atlantic as a check on Bell Atlantic to prevent it from discriminating against unaffiliated entities in the provision of its in-region directory assistance listings. However, the Bureau fails to explain exactly why the retention of the nondiscrimination requirements developed by the FCC under section 272(c)(1) satisfies the first criterion of forbearance by ensuring charges and practices with regard to directory assistance that are just and reasonable and not unjustly or unreasonably discriminatory.⁴ Paragraph 15 of the instant Order

³ Comments of Excell Agent Services, L.L.C. in CC Docket No. 97-172 (filed Nov. 12, 1999) ("Nov. 12th Comments").

⁴ See Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Memorandum

flatly states that: (1) Bell Atlantic must comply with the imputation requirements; (2) Bell Atlantic agrees to comply with the imputation requirements; and therefore, on this basis alone, (3) the first criterion for forbearance is satisfied.

If the Bureau's decision is that compliance with the nondiscrimination requirements set forth in the NDA Order satisfy the first criterion for criteria for forbearance, it must be because the nondiscrimination requirements ensure just and reasonable rates, terms and conditions which are also not unjustly or unreasonably discriminatory. The Bureau does not explain in the Order how the imputation requirements provide such assurance. The nexus between the imputation requirements and the first criterion of the criteria for forbearance is not explained or elaborated on in the Order. The FCC should reverse the Bureau's decision in the Order because the imputation requirements do not work and they currently allow the Bell Operating Companies ("BOCs") to distort the imputed costs of DA.

First, as demonstrated by the record in this proceeding, BOCs such as Bell Atlantic provide their in-region listings at different rates, terms and conditions to different classes of entities. As Excell explained in its comments to Bell Atlantic's petition in this proceeding,⁵ Bell Atlantic provides its DA listings to competitive carriers on more favorable terms than it does to independent DA providers such as Excell. This preempts its ability to comply with the imputation requirement because if it must impute the rates, terms and conditions it provides to others, it necessarily follows that it can only impute one rate, and one set of terms and conditions to itself. For instance, if Bell Atlantic modeled its behavior on US WEST's and charged \$0.017

Opinion and Order, 1999 FCC LEXIS 4715 (rel. Sept. 27, 1999) ("NDA Order").

⁵ See Nov. 12th Comments.

for DA listing updates to a CLEC pursuant to a state TELRIC proceeding, and \$0.05 for DA listing updates to other DA providers, it would not be able to comply with the imputation component of the nondiscrimination requirements because it could not logically impute more than one rate to itself.

In Bell Atlantic's case, because Bell Atlantic requires some DA providers to purchase a minimum number of listings in their contracts but does not require competing providers of telephone service to purchase a minimum number of listings, it automatically fails the imputation test. Bell Atlantic cannot both require itself to purchase a minimum number of listings and also not require itself to purchase a minimum number of listings. Thus, the imputation requirements cannot be met by Bell Atlantic. Moreover, Bell Atlantic's above-described conduct is discriminatory on its face, and thus precludes a finding that the first prong of the forbearance test has been satisfied. The Bureau had knowledge of this at the time it adopted the Order,⁶ yet did not address this issue in the Order.

Second, as Excell stated in its Comments, and also in its Comments to the forbearance petitions filed by Bell Atlantic South, BellSouth and SBC,⁷ the FCC must recognize the fact that the BOCs can manipulate the nondiscrimination requirements in a manner that permits them to continue to charge anti-competitive rates for DA data to unaffiliated entities. The only audit measure found in the nondiscrimination requirements is the requirement for a BOC to demonstrate imputation in its CAM. The Bureau suggests that a complaint may be appropriate if

⁶ Excell included this information in its Nov. 12th Comments.

⁷ Comments of Excell Agent Services, L.L.C. in CC Dkt. No-97-172 (filed Nov. 29, 1999).

Excell believes that Bell Atlantic has not complied with the NDA Order nondiscrimination requirements including the requirement to revise its CAM.⁸ However, Excell does not claim here, and did not claim in its comments to Bell Atlantic's CAM revisions,⁹ that Bell Atlantic has violated the requirement to reflect the imputation of DA listing costs in its CAM. Excell instead submits that even if Bell Atlantic has properly recorded the charges it imputes for providing its non-local DA listings in its CAM, the requirement to do so may force Excell and other unaffiliated entities to pay higher costs for DA listings than they rightfully should pay.

Bell Atlantic's recent CAM revisions demonstrate that the costs Bell Atlantic imputes to itself include the costs of services that Excell and other unaffiliated entities seeking DA listings have not requested and do not need. Excell and several other independent DA providers merely seek Bell Atlantic's DA listings (the listings which Bell Atlantic operators use to provide directory assistance) which means that the only costs that should be attributed to these companies are the incremental costs incurred by Bell Atlantic in compiling, maintaining and transmitting its DA listings. There is no breakdown of costs in the CAM. All of the imputed costs for DA listings and any related costs (including operator systems) are lumped into just a few categories. Thus, aside from being unworkable, the Bureau's Order does not adequately safeguard unaffiliated entities from nondiscriminatory behavior.

The FCC has more evidence on the record now than it did when it decided the NDA Order. This evidence unequivocally demonstrates that the nondiscrimination requirements fail to

⁸ See Order para. 19.

⁹ Comments of Excell Agent Services, L.L.C. in File No. ASD 99-46, DA 99-2465 (filed Dec. 6, 1999).

combat the BOCs' discriminatory treatment of unaffiliated entities in the BOCs' provision of DA listings. The release of this Order opens up another opportunity to re-examine the non-discrimination requirements and Excell submits that these requirements should be updated to address the evidence. Also, it is to the FCC's benefit to revise the nondiscrimination requirements now, before it applies the same requirements in its orders addressing the forbearance petitions of BellAtlantic South, BellSouth and SBC.

In particular, in reviewing the Bureau's Order, the Commission should ensure that any grant of forbearance be conditioned on any pro-competitive safeguards established in the CC Docket No. 99-273 proceeding, and that such safeguards are applied to the BOCs on a retroactive basis. The BOCs should not be entitled to receive forbearance now and be exempt from any pro-competitive safeguards that may be adopted for all LECs in the 99-273 proceeding. The BOCs also have not earned the right to enjoy a period of forbearance free from any pro-competitive safeguards pursuant to section 251(b)(3) and thus any safeguards should be applied retroactive to the date each BOC receives forbearance.

Finally, the Bureau instituted no audit mechanism to prove that a BOC is following the imputation requirement with regard to terms and conditions. The requirement to revise a cost allocation manual to reflect the change in the accounting does not account for the imputation of a BOC's terms and conditions. The only audit function that is required by the Order is the requirement for Bell Atlantic to adjust its CAM. Bell Atlantic has already filed its CAM revisions and the revisions do not demonstrate that Bell Atlantic provides region wide directory assistance at the same rates, terms and conditions it imputes to itself. The CAM requirement

must be reconsidered and an audit mechanism that accurately accounts for imputed terms and conditions must be implemented.

**B. BELL ATLANTIC HAS FAILED TO SATISFY
THE OTHER FORBEARANCE CRITERIA**

In paragraph 16 of the Order, the Bureau explains that “because competition will ultimately benefit consumers . . . the enforcement of section 272 is not necessary to prevent Bell Atlantic from engaging in conduct that would impede competition in the market for non-local directory assistance service, and thereby harm consumers.” The Bureau determined that this satisfied the second criterion for forbearance which holds that forbearance is appropriate when the enforcement of a regulation is not necessary for the protection of consumers. Similarly, in paragraph 17 of the Order, the Bureau concluded that the third criterion for forbearance is met because forbearance allows Bell Atlantic to become a more effective competitor in the market for non-local directory assistance services “which would ultimately benefit consumers because they would be able to obtain a convenient, competitively priced service.” The third criterion holds that forbearance is appropriate when it is consistent with the public interest. This public interest criterion can be met if it is demonstrated that forbearance will promote competitive market conditions.¹⁰

Forbearance undoubtedly will permit Bell Atlantic to compete more effectively in the non-local directory assistance market. However, because of Bell Atlantic’s “competitive advantages . . . in the provision of telephone numbers inside its region that stem from its

¹⁰ See 47 USC § 160(b).

dominance” in the local exchange and exchange access markets,¹¹ it remains increasingly difficult for Excell and other providers of directory assistance to compete in the national directory assistance market. Bell Atlantic’s backyard contains the DA listings that Excell needs in order to compete in the national directory assistance market. While forbearance permits Bell Atlantic to further strengthen its position in the national directory assistance market, other DA providers still struggle to obtain the DA listings in Bell Atlantic’s territory. The Bureau’s Order, in its analysis of the latter forbearance criteria, disregards the fact that consumers are not protected from anti-competitive practices when one very large competitor is permitted to become a Goliath while the other previously existing competitors in the national DA market are still fighting the same backyard battles just to get to a level playing field. Consumers and the public interest are not protected and served by the existence of a only a few very large DA providers owed by BOCs. Unfortunately, that is exactly what the Order promotes. Accordingly, the Commission should overturn the Bureau’s grant of forbearance to Bell Atlantic because such grant will not promote competition and is contrary to the public interest.

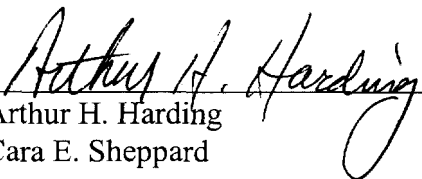
III. CONCLUSION

For the reasons stated herein, Excell urges the Commission to take this opportunity to acknowledge that the nondiscrimination requirements do not ensure that Bell Atlantic’s (and the other BOCs) charges and terms with respect to providing DA listings to unaffiliated entities are are just and reasonable and are not unjustly or unreasonably discriminatory. This and the other forbearance criteria must be met in order for forbearance to be applied. Thus, the FCC should

¹¹ Order, para. 15, n.42.

either decide to decline to forbear or revise the nondiscrimination requirements to include a proper audit mechanism that explains the imputation of rates with specificity and provides an audit mechanism that tracks whether the BOCs have properly imputed terms and conditions. The FCC should also find that any pro-competitive safeguards required of the LECs in the upcoming order in CC Docket 99-273 must be applied to Bell Atlantic on a retroactive basis.

Respectfully submitted,
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January 21, 2000

CERTIFICATE OF SERVICE

I, Tonya Y. VanField, hereby certify that a copy of the foregoing Application for Review of the Commission's Memorandum Opinion and Order in CC Docket No. 97-172, In the Matter of Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection With National Directory Assistance Services (rel. Dec. 22, 1999) was served this 21st day of January, 2000, via hand delivery, and first-class mail upon the following:

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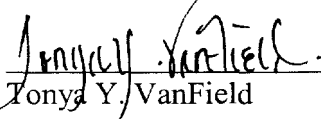
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